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SUPREME COURT OF THE UNITED STATES.

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THOMAS A. DWYER, Pl'ff in Error,

vs.

WILLIAM H. DUNBAR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

GIDEON, Printer.

SUPREME COURT OF THE UNITED STATES.

No. 271.

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vs.

WILLIAM H. DUNBAR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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Caption.

THE UNITED STATES OF AMERICA,
Eastern District of Texas:—

At a term of the District Court of the United States, begun and held at the city of Galveston, within and for the Eastern District of Texas, on the first Monday of December of the year of our Lord one thousand eight hundred and fifty-nine—present the Honorable John C. Watrous, Judge of said court; H. E. McCulloch, Esq., United States Marshal; George Mason, Esq., United States Attorney; and James Love, Clerk—at a day certain of said term, to wit, the tenth day of January, A. D. one thousand eight hundred and sixty: among other were the following proceedings, that is to say:—

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER. } Law, No. 676.

Be it remembered, that heretofore, to wit, on the twenty-eighth day of August of the year of our Lord one thousand eight hundred and fifty-seven, came the plaintiff, by his attorney, and filed his petition herein in words and figures in substance as follows, that is to say:—

Petition.

United States of America, Eastern District of Texas.

In the District Court of the United States for the Eastern District of Texas, fall term, 1857, at Galveston.

THOMAS H. DUNBAR
vs.
THOMAS A. DWYER.

To the Hon. John C. Watrous, Judge of the District Court of the United States for the Eastern District of Texas, setting at Galveston.

The petition of William H. Dunbar, a citizen of the State of New York, residing in the city of New York, merchant, plaintiff, against Thomas A. Dwyer, a citizen of the State of Texas, residing at Corpus Christi, in the county of Nueces, in said State, and in this district, merchant, defendant, respectfully showeth:—

That the said Dunbar owes plaintiff a large sum of money, for this: that heretofore, to wit, at New York, in the State of New York, on the 21st September, 1854, the said defendant made, executed, and delivered, for value received, to one George C. Dunbar, who then was, has continued to be, and still is a citizen of the State of

New York (residing in the city of New York), his certain promissory note of date the day and year last aforesaid, and in words and figures following:—

$1476 $\frac{73}{100}$. New York, September 21st, 1854.

Ten months after date, I, the subscriber, of Corpus Christi, county of Nueces, State of Texas, promise to pay to the order of Mr. Geo. C. Dunbar fourteen hundred and seventy-six $\frac{73}{100}$ dollars at Gardner, Green, & Co. office, with current rate of exchange on New York, at maturity. Value received.

No. 3149. Due July 21—23. THOMAS A. DWYER.

That afterwards, and before the same was due, the said George C. Dunbar endorsed and delivered said note for a valuable consideration to plaintiff, by which endorsement and delivery defendant had due notice, and plaintiff shows to the court here the said notes, marked Exhibit (A).

That afterwards, at New York aforesaid, on the 21st day of September, 1854, the said defendant made, executed, and delivered, for value received, to the said George C. Dunbar his certain other promissory note of that date, and in the words and figures in substance as follows, to wit:—

$1476 $\frac{73}{100}$. New York, September 21st, 1854.

Ten months after date, I, the subscriber, of Corpus Christi, county of Nueces, State of Texas, promise to pay to the order of Mr. Geo. C. Dunbar fourteen hundred and seventy-six $\frac{73}{100}$ dollars, at —, with the current rate of exchange on New York, at maturity. Value received.

No. 3150. Due July 21—24. THOMAS H. DWYER.

That afterwards, and before the same was due, the said George C. Dunbar endorsed and delivered said note to plaintiff for a valuable consideration, of which endorsement and delivery the said defendant had notice, and plaintiff shows to the court here the said note, marked Exhibit (B).

That the said notes have both been long since due and payable, and that, though often requested, the said defendant has wholly failed and refused to pay said notes, or any part of either of them, to plaintiff, and that the whole amount of both notes is still due and owing to plaintiff.

Plaintiff alleges that the current rate of exchange between Texas and New York was at the maturity of said notes two per centum premium.

He prays that process of citation issue, citing the said Thomas A. Dwyer to appear at the next term of your hon. court, to be held at Galveston, to answer this petition and for judgment against him for the amount of the said notes and interest from maturity at seven per centum per annum, and exchange on New York, and costs of this

suit. He prays for such other and further relief as he may be entitled to in the premises, and, as in duty bound, will ever pray.

EDWARD T. AUSTIN, for Plaintiff.

And afterwards, on the 28th day of August, A. D. 1857, a citation issued against the defendant in words and figures, as follows:—

Citation.

United States District Court, Eastern District of Texas.

The President of the United States of America to the Marshal of the Eastern District of Texas, or any of his lawful deputies, greeting:—

You are hereby commanded to summon Thomas A. Dwyer, if he be found in your district, to be and appear before the Honorable the District Court of the United States, at a court to be holden in and for the Eastern District of Texas, at Galveston, on the first Monday of December next, to answer to the petition and complaint of William H. Dunbar against the said Thomas A. Dwyer in an action of debt on two promissory notes of $1476\frac{73}{100}$ each, interest and exchange, and costs of suit, of which you will serve the said defendant, Thomas A. Dwyer, with the accompanying copy of said petition.

Witness the Honorable John C. Watrous, Judge of said court, and the seal of said court, done at the city of Galveston, this 28th day of August, A. D. 1857, and the 82d year of the independence of the United States of America.

JAMES LOVE, Clerk.

On which said writ of citation, the marshal afterwards made return in words and figures as follows:—

Return of Marshal.

Received August 28th 1857.

And on Thursday, September 3d, A. D. 1857, at the city of Corpus Christi, in the county of Nueces, Eastern District of Texas, 200 miles from the city of Galveston, I executed this writ by giving the defendant, Thomas A. Dwyer, in person a true copy thereof, and a certified copy of the petition.

200 mls. C'c,	12 00
Service,	2 00
Marshal's fee,	$14 00

BENJ. McCULLOCH, U. S. Marshal.
by CHS. LORMSKIRK, Deputy.

And afterwards, on the fourth day of December, A. D. 1857, the defendant by his attorney filed his answer in words and figures as follows:—

Answer.

District Court of the United States, Eastern District of Texas, at Galveston.

W. H. DUNBAR and GEO. DUNBAR
vs.
THOMAS A. DWYER.

And now comes the said Thomas A. Dwyer, by his attorneys, and in answer to said plaintiff's petition, says as follows:—

First. That said petition is insufficient in law, and he demurs and excepts thereto.

Second. That he denies all and singular the allegations in said petition contained to be true, and insists upon strict proof thereof.

Third. That he has wholly paid and satisfied any and all of the said plaintiffs against him, arising or growing out of the present demand.

ALLEN & HALE, Att'ys for defendant.

And afterwards, on the 31st day of December, A. D. 1857, the affidavit of F. J. Parker was filed in this cause in words and figures as follows:—

Affidavit.

W. H. DUNBAR
vs.
THOMAS A. DWYER.

Now comes F. J. Parker, agent of William G. Hale, attorney for the defendant in the above entitled cause, who being duly sworn deposes and says, that the said William G. Hale is absent from this city, in attendance upon the Supreme Court of the United States, and that his partner, E. Allen, is also absent, in attendance at the court of Corpus Christi; that defendant, as affiant believes, has no other attorney or other person to defend him in this court; affiant further says, that he received a letter from said Hale, from New Orleans, enclosing an answer of the said defendant, which answer sets up payment in full of the demand of plaintiff, and affiant knows of no person other than the said Hale who has the knowledge of the facts of the case; affiant further says that the said Hale is only temporarily absent, and expected to be in attendance upon the court at the present term thereof, but owing to the unexpected near adjournment of the same, he has not been able to be present. Affiant further says, that this application for continuance is not made for delay, but that justice may be done.

F. J. PARKER for
WM. G. HALE.

Subscribed and sworn to before me this 31st Dec., A. D. 1857.
JAMES LOVE, Clerk.

And afterwards, on the 31st day of December, A. D. 1857, the

plaintiff by his attorney filed his exhibit (A), in words and figures as follows:—

Exhibit A.

$1476\frac{73}{100}$. New York, September 21st, 1854.

"Ten months after date, I, the subscriber, of Corpus Christi, county of Nueces, State of Texas, promise to pay to the order of Mr. Geo. C. Dunbar, fourteen hundred and seventy-six $\frac{73}{100}$ dollars, at Gardner, Green & Co. office, with the current rate of exchange on New York, at maturity, value received.

No. 3149, Due 21–24 July. THOMAS A. DWYER.

And afterwards, on the 31st day of December, A. D. 1857, the plaintiff by his attorney filed his exhibit (B), in words and figures as follows:—

Exhibit B.

$1,476\frac{73}{100}$. NEW YORK, September 21st, 1857.

"Ten months after date, I, the subscriber, of Corpus Christi, county of Neuces, State of Texas, promise to pay to the order of Mr. Geo. C. Dunbar, fourteen hundred and seventy-six $\frac{73}{100}$ dollars, at ——, with the current rate of exchange on New York, at maturity. Value received, No. 3150. Due July 21—24.

THOMAS A. DWYER.

And afterwards, to wit, on the 31st Dec., 1857, the plaintiff filed a paper containing a calculation of principal, interest, and exchange in words and figures, as follows:—

Exhibit referred to above.

Two notes due 24th July, '55, each for $1,476 73,	$2,953 46
Interest to 28th December, at 7 p. c. 2, 5 mos. 4 days,	500 33
Exchange on New York, $\frac{1}{4}$ of 1 p. c.,	22 14
Interest to 31st, 4 days, at 5.7 per diem,	$3,475 93 2 28
	$3,478 21

And afterwards, to wit, on the 31st day of December, A. D. 1857, the following proceedings was had in said cause, in words and figures as follows:—

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

On this day came the parties by their attorneys, and thereupon came on to be heard the motion and affidavit of F. J. Parker, agent for the defendant's counsel, praying a continuance herein. And after argument of counsel heard, it is ordered that said motion be

overruled. And thereupon came a jury of good and lawful men, to wit: J. H. Thackara, John Cromean, Jasper Taheun, Henry Van Beuren, Alfred W. Coates, R. Reynaud, A. M. Hughes, Hiram Oise, R. D. Johnson, F. J. Parker, J. D. Hamilton and M. F. Mott, who being duly elected, tried, and sworn well and truly to try the issue joined, on their oaths, do say, "We the jury find for the plaintiff the sum of three thousand four hundred and seventy-eight dollars and twenty-one cents. F. J. PARKER, Foreman.

It is therefore considered by the court now here that the plaintiff do have and recover of and from the defendant the sum of three thousand four hundred and seventy-eight dollars and twenty-one cents, for his damages by the jurors aforesaid assessed, and the further sum of forty-five dollars and twenty-five cents, his costs about his suit in this behalf expended, for which execution may issue.

And afterwards, on the 2d day of January, A. D. 1858, a motion of Ebenezer Allen, defendant's attorney, was filed in words and figures as follows:—

Motion.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER. } No. 676.

District Court of the United States for the Eastern District of Texas, at Galveston, Dec. Term, 1857.

And now comes Ebenezer Allen, of counsel, and one of the attorneys for the said defendant, Thomas A. Dwyer, and being first duly sworn, on oath, deposes and says, that he is informed, and verily believes the fact to be that the said defendant has a just and a meritorious defence against the plaintiff's demand in the above-entitled cause, available under the present state of pleadings therein, or under such amendment as would be permissible to the said defendant, of course, which defence is based upon an assignment of property, made by the said defendant for the benefit and with the consent of his creditors, whereof the said Dunbar, plaintiff, is one who accepted the same before the commencement of said suit, which assignment was (as this affiant is informed and believes) true by deed, and bound the creditors aforesaid, and the plaintiff is one of them, to the payments, terms, and conditions therein covenanted and established, whereby the plaintiff's action aforesaid is barred.

And this affiant further says, that owing to the unavoidable absence of the defendant's attorneys, under circumstances which (he is advised) are admitted sufficient to exonerate their said client from the charge of *laches* and its consequences, he has not been represented in court until to-day, and that a judgment has been rendered against him at a former day of the term.

Affiant further says that he cannot obtain the proofs necessary to said defence at this time, but by the next term he will, as he verily

believes, be able to procure them, and that he cannot go safely to trial without them.

Therefore, he moves the court, that the verdict and judgment had as aforesaid, in the cause against the said defendant, at this term, be set aside, and that a continuance be granted, and he says that this is the first application for a continuance therein, and that it is not made for delay, but that justice may be done.

EBENEZER ALLEN.

Sworn and subscribed before me this 2d day of Jan'y, 1858.

F. J. PARKER, U. S. Commissioner.

And afterwards, on the second day of January, A. D. 1858, an order was made in this cause in words and figures, as follows:—

Order.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER. } 676.

On motion of Ebenezer Allen, of counsel for the defendant, filed this day. It is ordered, that the judgment heretofore rendered in this cause, on the 31st December last past, be and the same is hereby set aside, and a new trial granted.

And afterwards, on the 15th day of May, A. D. 1858, the defendant, by his attorney, filed an amendment to his answer in this cause, in words and figures as follows:—

Amended Answer.

District Court of the United States, Eastern District of Texas, at Galveston.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

And now again comes the defendant, by his attorneys, and in amendment to his answer heretofore filed, further says: that the said plaintiff his action aforesaid ought not to have and maintain against him, because he says, that heretofore, to wit, on the 21st day of July, in the year eighteen hundred and fifty-six, and after the maturity of the notes sued on, one Henry M. Smyth, by and with the authority of the said plaintiff, and acting for him, made and carried into effect a general settlement of the indebtedness of the said defendant to the other creditors in the city of New York aforesaid, and to the said plaintiff, and signed and gave to the said defendant the following acquittance and receipt, to wit:—

Received of Thomas A. Dwyer, Esq., thirty-five thousand five hundred dollars in merchandise ($35,500), in full for the annexed amounts to date, which amount includes the amount of William H. Dunbar, assignee of Geo. Dunbar, whose power of attorney I do not

hold, but whose agent said, that Mr. Dunbar was willing to do what the balance of New York creditors were, in case the said Dunbar declines acceptance of the above composition, the pro rata due him is to be held subject to the order of said Dwyer.

H. M. SMYTH, Atto.
C. B. TWEEDY & CO., and others.

Zacatecas, 21 July, 1856.
Wit.: C. M. McDONELL.

And the said defendant says, that the said receipt was so signed by the said Henry M. Smyth, by the authority of the said plaintiff, and that the amount of William H. Dunbar, assignee of Geo. Dunbar therein mentioned, was the amount of the two notes now sued on, and that the said plaintiff has not, since the execution of said receipt, declined acceptance of the compromise therein, or *to* refused to receive his pro rata share as expressed therein, or notified the said defendant of such refusal, or offered to return such share; but on the contrary, has ratified the said settlement and composition. All which the said defendant is ready to verify.

Wherefore the said defendant says, that the demand of the said plaintiff has been fully satisfied, and prays judgment, &c., and his costs.

ALLEN & HALE, Att'ys for Def't.

And afterwards, on the 10th day of July, A. D. 1858, the plaintiff, by his attorney, filed a replication to defendant's amended answer, in words and figures as follows:—

Replication.

United States of America, Eastern District of Texas, at Galveston.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.
} July Term, 1858. Suit pending.

And now, at this term of the court, comes the plaintiff, by his attorney, and for replication to the amended answer of defendant, filed the 15th May, 1858, says, that for anything in said amended answer contained, plaintiff ought not to be barred from maintaining his said action; and of this he prays the judgment of the court.

And further the plaintiff says that he did not authorize said Henry M. Smyth to settle his claim on defendant, and that the said Smyth acted without authority from plaintiff, in giving the receipt set up in said answer; and further, plaintiff says that he has refused to agree to said settlement, and has not accepted any composition of said claim; that he has not ratified said settlement and composition, and gave notice to defendant of his refusal to ratify said settlement, to wit, by the institution of this suit; and further, plaintiff denies all and singular the allegations in said answer contained, and insists on strict proof of the same.

EDWARD T. AUSTIN,
Attorney for Plaintiff.

And afterwards, on the 10th day of February, A. D. 1859, the defendant, by his attorney by leave of the court, filed an amendment to his answer, and amended answer in words and figures, as follows:

Amendment of Answer and Amended Answer.

DUNBAR
vs.
DWYER.

And now comes the defendant by his attorneys, and by leave of the court, amends his answer and amended answers herein by adding the following allegations, to wit:—

And this defendant further says, that the said plaintiff, before the receipt set forth in the former amended answer was signed and given by a letter written and executed by his authority, authorized the said defendant to make the settlement set forth in and by the said receipt, and thereby sanctioned and approved in advance the said settlement and compromise, which said letter was dated on the 22d day of May, 1856, and was written and signed and sent to the said defendant by J. T. Ray, acting for and by the authority of the said plaintiff, and for greater certainty, the said defendant refused to the said letter now on file attached to the deposition of said H. M. Smyth, and makes the said letter a part of this amendment.

ALLEN & HALE,
Attorneys for Defendant.

And afterwards, to wit, on the 10th day of February, A. D. 1859, an order was entered in this cause in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs. 676.
THOMAS A. DWYER.

On this day came the parties by their attorneys, and thereupon came a jury of good and careful men, viz: V. T. Datton, L. C. Ferguson, Alexander C. Crawford, John Cromean, Preston Perry, Alexander Dunn, Alexander Stewart, William Shields, William F. Crow, William P. Griffiths, John Barke, and Thomes Pritchard, who being elected, tried, and sworn well and truly to try the issue formed, and some progress having been made in the trial of the cause and not having time to go through the same, it is ordered by consent of parties that the jury be permitted to disperse until the calling of the cause to-morrow.

And afterwards, on the 11th day of Ferbuary, A. D. 1859, an order was made in the cause, in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs. } 676.
THOMAS A. DWYER.

The jury having failed to agree on a verdict in this cause, by consent of parties they were permitted to disperse until the calling of the cause, to-morrow.

And afterwards, on the 11th day of February, A. D. 1859, an order was made in this cause, in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs. } 676.
THOMAS A. DWYER.

The jury in this cause having failed to agree upon a verdict, by consent of parties it is ordered that a juror be withdrawn, and the cause continued until the next term of this court.

And afterwards, on the 25th day of May, A. D. 1859, an order was made in this cause, in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs. } 676.
THOMAS A. DWYER.

On this day came the parties by their attorneys, and thereupon came a jury of good and lawful men, viz., Samuel Parr, H. W. Benteck, R. B. Crozier, Stephen Richardson, Luke Bryan, John N. Anderson, John C. McCauley, Whitfield Davidson, Thomas Knight, D. H. Kough, David H. Grove and John Howard, who being elected, tried and sworn well and truly to try the issue joined—on their oaths do say, we, the jury, find for the plaintiff in the sum of three thousand seven hundred and forty-five dollars and ninety-seven hundredth dollars, principal and interest, "John Howard, foreman." It is therefore considered by the court, that plaintiff recover of defendant three thousand seven hundred and forty-five dollars and ninety-seven cents, in manner and form by the jurors aforesaid assessed; and also dollars and his costs about suit in this behalf expended, for all of which execution may issue.

And afterwards, on the 27th day of May, A. D. 1859, the defendant, by his attorneys, filed his motion for a new trial, in words and figures, as follows:—

Motion for New Trial.

District Court of the United States, Eastern District of Texas, at Galveston.

DUNBAR
vs.
DWYER.

And now comes the defendant, by his attorneys, and moves for a new trial of this cause, for the following reasons:—

First. Because the court erred in excluding evidence.

Second. Because the court erred in refusing the second instruction asked by the defendant.

Third. Because the court erred in giving the instructions requested by the plaintiff.

Fourth. Because the verdict was against law and the evidence.

ALLEN & HALE,
For Defendant.

And afterwards, on the 5th day of August, A. D. 1859, the court made an order in this cause, in words and figures, as follows:—

Order.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

And now came on to be heard the motion of defendant for a new trial, after argument of counsel heard, because it seems to the court that the law is for the defendant. It is ordered that the judgment be set aside, and a new trial granted.

And afterwards, on the 19th day of December, A. D. 1859, the plaintiff filed a plea and replication to defendant's amended answer, and amendment to the same, which last was filed 10th of February, 1859, in words and figures, as follows:—

Replication and Plea.

The United States of America, Eastern District of Texas.

Fall Term, 1859, District Court of the United States for the Eastern District of Texas.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

And now comes William H. Dunbar, plaintiff in the above entitled cause, and for plea to the allegation of settlement in defendant's amended answer contained, and to thea mendment filed 10th February, 1859, that he denies all the allegations contained therein, and on oath says: That the letter referred to in said amendments, dated 22d May, 1856, directed to T. A. Dwyer, and signed, J. S.

Ray, for W. H. Dunbar, assigned by G. C. Dunbar, was not written by him, nor by his authority. He further says, that he never authorized Henry M. Smyth, or any other person, to compound or compromise, or settle the claims he holds against Thomas A. Dwyer, and on which this suit is founded; and further he says, that he did not authorize any one to appear for him at the meeting of the creditors of Thomas A. Dwyer; and that he has not received a dollar of the composition of said claims, made by H. M. Smyth, without his authority.

WILLIAM H. DUNBAR.

United States of America, Massachusetts District, Boston, Nov. 8th, 1859.

Then personally appeared the said William H. Dunbar, and made solemn oath that the within affidavit, by him subscribed, is true. Before me. In witness whereof, I have hereunto subscribed my name, and affixed the seal of the U. S. District Court for the said District of Massachusetts, on the 8th day of Nov., A. D. 1859.

[SEAL.]

Attest: RICHARD BASSELL,
Clerk of Dist. Court U. S., Mass. Dist.

And afterwards, on the 26th day of December, A. D. 1859, the court here made an order in this cause in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

On motion of plaintiff's attorney, it is ordered that the clerk make publication of the deposition of J. Ray, and file in this cause, which was accordingly done, in open court.

And afterwards, on the 10th January, A. D. 1860, the court here made an order in this cause, in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER. } 676.

On this day came the parties by their attorneys, and thereupon came a jury of good and lawful men, to wit—John Rose Tally, Francis R. Cobb, John Guthrie, Paul Helfinch, Aaron Burns, James W. Moore, Daniel Harvey, William C. Lilliard, William F. Heard, James B. Tucker, William G. Banks, and Moses L. Choate, who being elected, tried, and sworn well and truly to try the issue joined, who after hearing the evidence and argument of counsel, returned into court the following verdict:—

"We, the jury, find for the plaintiff in the sum of three thousand nine hundred dollars and seventeen cents, principal, interest, and exchange ($3,900 17). "JAMES W. MOORE, Foreman."

And afterwards, on the 12th day of January, A. D. 1860, the defendant by his attorneys filed his motion for a new trial herein in words and figures as follows:—

Motion for New Trial.

District Court of the United States, Eastern District of Texas, at Galveston.

WILLIAM H. DUNBAR
vs. } No.
THOMAS A. DWYER.

And now comes the defendant by his attorneys, and moves the court to grant a new trial in this cause.

First. Because the verdict of the jury is against law.

Second. Because it is contrary to the evidence.

Third. Because it is excessive.

Fourth. Because the court erred in excluding evidence offered by the defendant.

Fifth. Because the court erred in giving to the jury the instructions requested by the plaintiff.

ALLEN & HALE, for defendant.

And afterwards, on the 21st day of February, A. D. 1860, the court here made an order in this cause in words and figures as follows:—

Order.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

On this day came on to be heard the motion of defendant for a new trial in this cause. After argument of counsel heard, because it seems to the court that the law is for the plaintiff, it is ordered that the motion be overruled. It is now considered by the court that the plaintiff recover of the defendant the sum of three thousand nine hundred dollars and seventeen cents, the principal, interest, and exchange, as assessed by the jury on the 10th day of January, a day of this term; and also the sum of dollars and cents, his cost about his suit in this behalf expended; for which execution may issue.

And afterwards, on the 24th day of February, A. D. 1860, the defendant, by his attorneys, filed his bill of exception to the rulings of the court in this cause, which is in words and figures as follows:—

Bill of Exception.

District Court of the United States, Eastern District of Texas, at Galveston.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

Be it remembered, that upon the trial of this cause, the plaintiff to maintain the issues on his part, gave in evidence the notes described in the petition, and proved the rate of exchange on New York, at the time of their maturity, to have been one and three-fourth per cent. premium; and the defendant then to maintain the issue on his part, offered in evidence the deposition of Henry M. Smyth, together with a letter signed by said Smyth, and attached and referred to in the said deposition, which deposition and letter were as follows:—

Deposition and Letter referred to of Henry M. Smyth.

The United States of America, District of Texas, State of Texas, County of Bexar:—

Be it remembered, that on this, the 24th day of April, in the year of our Lord one thousand eight hundred and twenty-eight, I, William F. Weeks, Chief-Justice of the County Court of Bexar County, of State of Texas aforesaid, under and by virtue of the act of the Congress of the United States, entitled, "An act for the more convenient taking of bail and affidavits in civil cases, depending in the courts of the United States," passed February 20th, 1812; and the act of the said Congress, entitled "An act in addition to an act, entitled an act for the more convenient taking of bail and affidavits in civil cases depending in the courts of the United States," passed March 1st, 1817; and the act of the Congress, entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789; did, at the request of Thomas A. Dwyer, call and cause to be, and personally appeared before me at the city of San Antonio, in the said district and State, Henry M. Smyth, to testify and the truth to say on the part of the defendant, in a certain cause or suit, now depending and undetermined in the District Court of the United States for the Eastern District of Texas, at Galveston, in the said State of Texas, wherein William H. Dunbar is plaintiff, and T. A. Dwyer is defendant. And the said Henry M. Smyth, being of sound mind and lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause or suit aforesaid, was carefully examined by me and he did thereupon depose, testify, and say as follows, that is to say:—

"That at a meeting of the creditors of Thomas A. Dwyer, held at the office of O. B. Tweedy & Co., in the city of New York, in the month of May, 1856, sundry creditors then and there appeared and

nominated this affiant, who was appointed the attorney of certain creditors of said Dwyer, to proceed to the residence or whereabouts of said Dwyer and adjust their claims against said Dwyer. That amongst those who came to the office of O. B. Tweedy & Co. there was a person who represented himself as appearing for W. H. Dunbar, assignee of George C. Dunbar, one of the creditors of said Dwyer. This person, whose name I do not remember and do not know that I ever knew, stated that Dunbar, assignee as aforesaid, was willing to do what other creditors were, respecting the claim of George C. Dunbar; that he, Dunbar, assignee, did not wish to sign any papers, for fear of implicating himself with the creditors of George C. Dunbar. Mr. Tracy, of the firm of Reed, Sprague, & Co., heard the conversation, and was particularly addressed by the person representing or appearing for said Dunbar, assignee. That this affiant proceeded to the city of Zacatecas, in the republic of Mexico, and there received from said Dwyer the sum of thirty-five thousand five hundred dollars ($35,500) in merchandise, in settlement of the claims he held against Dwyer. That the claim of Dunbar was embodied in this settlement. That although the said Smyth did not hold the power of attorney of said Dunbar, assignee, he presumed he would be doing right in adjusting the same, predicating his acts upon the representations of the person above spoken of, who appeared as agent of Dunbar. That this affiant gave to said Dwyer a conditioned receipt respecting said claims of Dunbar; that this affiant sold the goods received from Dwyer to the best possible advantage, and for the principal sales received drafts upon Liverpool, which drafts have been paid and disbursed among the several creditors represented by this affiant. That the house of Kents, Lowber, & Smyth, of the city of New York, were the recipients of the funds received by this affiant; that this affiant is informed and believes that all the funds received have been paid to the creditors of said Dwyer, except the *pro rata* received for amount of Dunbar, assignee of George C. Dunbar. The letter of this affiant to Charles Russell was written in reply to a letter of said Russell wishing to know the circumstances respecting the settlement made in the Dunbar claim by me. This affiant is not acquainted with J. S. Ray or his signature. That the *pro rata* due the said Dunbar as assignee has never been paid back to said Dwyer by said Dunbar, or any one else, as this affiant believes. That the house of Kent, Lowber, & Co. succeeded to the house of Kents, Lowber, & Smyth, and to the business of the same in the city of New York. H. M. SMYTH.

And I, William F. Weeks, chief-justice aforesaid, do hereby certify, that the reasons for taking the foregoing deposition is, and the fact is, that the testimony of the said witness is material and necessary in the civil cause or suit in the caption of the said deposition named; and that he lives in the city of San Antonio, in the county of Bexar, in the State of Texas. I further certify, that no notification of the

time and place of stating the said deposition was given to the adverse party or his attorney—they being more than one hundred miles from the place of taking the same at the time aforesaid.

I further certify, that on the said day and year first above mentioned I was attended by said witness, and thereupon the above deposition was taken and reduced to writing by me in the presence of said witness and from his statements; and after carefully reading the same to the said witness, he subscribed his name thereto as above written. I have retained the said deposition in my possession for the purpose of sealing up and directing the same, placing the same in the post office, at the city of San Antonio aforesaid, to be forwarded by mail to the clerk of the court for which the same was taken. And I do further certify, that I am not of counsel or attorney for either of the parties in the said deposition or caption named, nor in any way interested in the event of the said cause or suit.

The passage marked 1, 4, and 5, were stricken out before signing.

To certify which, I hereunto sign my name and affix the seal of the County Court of said county the day and year above written.

[SEAL.] WILLIAM F. WEEKS,
Chief Justice, Bexar County.

Letter referred to.

Stone Mountain, Sept. 24, '57.

Charles Russell, Esq., Corpus Christi, Texas.

Dear Sir: Yours of 5th inst., inclosing copy of letter from Mr. Dwyer, reached me last night. The agent of Dunbar, assignee of Geo. Dunbar, met with the creditors of Dwyer, at the office of O. B. Tweedy & Co., New York, previous to my departure for Mexico, this agent, whose name I do not remember, said, in presence of myself and Mr. Tracy, of Reed, Sprague & Co. and, for aught I know, of others, that Mr. William H. Dunbar objected, as assignee, to signing the power of attorney to me for fear of implicating himself with creditors of George Dunbar, but that William H. Dunbar would agree to any adjustment the other creditors did. Mr. William H. Dunbar was understood to be absent from the city at the time of the meeting, if my memory serves. Mr. Tracy will remember the conversation, not having the signature of Dunbar to the power of attorney, I inserted a promise in the receipt given to Dwyer. As to the claim of Dunbar, though the letter from Dunbar to Dwyer, shown me by the latter, appeared to me to be authority to Dwyer to adjust the claim with me upon the same basis that the other claims were arranged, Mr. William H. Dunbar, assignee of George Dunbar, is clearly obliged to stand up to the arrangement made by me. With regard to the letter opened by you and forwarded to me at Laredo, you are, I think, in error, as the one I received at Laredo was from L. Edgerton of John Shward, jr., & Co., which you had endorsed as opened by mistake. If there was a letter from Dunbar, it did not reach me, as, in my settlement with Dwyer, the letter to me would

have been the authority; however, there can be no doubt as to Dunbar's position. The word of his agent to Mr. Tracey and myself, as also the letter to Dwyer, is good evidence. Have not been in N. Y. this summer; and not in a hurry to risk my health there. I do not know what has been done with the funds—the whole matter was to have been closed this month. The drafts on London, or Liverpool, which were received for the goods, fell due I think the present month. Kent, Lowber & Co. held the drafts, and can enlighten you as to the funds. I regret very much that Dunbar should pursue such a course, —it is, as I took it, dishonorable. Any evidence required from me will be cheerfully given. I hope to be in N. O. soon.

H. M. SMYTH.

P. S. Upon my return to New York last fall, a meeting of creditors was held at the office of Kent, Lowber & Co.'s, and all the creditors present approved the compromise, with the exception of R. Hudson and Pulham; am not sure that Dunbar was present; think he was not. Your letter to me is the first instruction I have had of any objections on the part of Dunbar. I presumed that he making no objection was also satisfied. H. M. S.

But the court, on the objection made on the part of the plaintiff to the admission of the said letter in evidence on the ground that it was not stated on oath by said Smyth, that the statements of the said letter were true, refused to admit said letter in evidence, and excluded the same, to which ruling of the court the defendant then, and before the jury retired, excepted, and now tenders his bill of exceptions hereto.

And the defendant, having read the said deposition, and the letter of J. S. Ray thereto appended, but without said letter of said Smyth in evidence, also gave in evidence the power of attorney therein referred to, made by certain creditors of said defendant to said Smyth, with the certificate thereto appended and the receipt thereon endorsed. All of which were as follows:—

Deposition of Henry M. Smyth referred to.

The United States of America, District of Texas, State of Texas, County of Bexar.

Be it remembered, that on this the 24th day of April, in the year of our Lord one thousand eight hundred and fifty-eight, I, William F. Weeks, Chief Justice of the County Court of Bexar County, State of Texas aforesaid, under and by virtue of the act of Congress of the said United States, entitled "An act for the more conveniently taking of bail and affidavits in civil causes depending in the courts of the United States," passed February 20th, 1812, and the act of the said Congress, entitled "An act in addition to an act, entitled 'An act for the more convenient taking of bail and affidavits in civil causes, depending in the courts of the United States,'" passed March

1st, 1817, and an act of the said Congress, entitled, "An act to establish the Judicial Courts of the United States," passed September 24th, 1789, did, at the request of Thomas A. Dwyer, call and cause to be, and personally appear before me at the city of San Antonio, in the said District and State, Henry M. Smyth, to testify, and the truth to say, on the part of the defendant, in a certain cause or suit now depending, and undetermined in the District Court of the United States for the Eastern District of Texas, at Galveston, in the said State of Texas, wherein William Dunbar is plaintiff, and Thomas A. Dwyer is defendant. And the said Henry M. Smyth being of sound mind and lawful age, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause or suit aforesaid, was carefully examined by me, and he did thereupon depose, testify, and say, as follows, that is to say—

That, at a meeting of the creditors of Thomas A. Dwyer, held in the office of Messrs. C. B. Tweedy & Co., in the city of New York, on the 9th of May, 1856, sundry creditors then and there appeared, and nominated this affiant, who was appointed the attorney of certain creditors of said Dwyer, and adjust their claims against said Dwyer. That amongst those who came to the office of C. B. Tweedy & Co. there was a person who represented himself as appearing for William H. Dunbar, assignee of George C. Dunbar, one of the creditors of said Dwyer. This person, whose name I do not remember, and do not know that I ever knew, stated that Dunbar, assignee as aforesaid, was willing to do what other creditors were, respecting the claim of George C. Dunbar; that he, Dunbar, assignee, did not wish to sign any papers for fear of implicating himself with the creditors of George C. Dunbar. Mr. Tracy, of the firm of Reed, Sprague & Co., heard the conversation, and was particularly addressed by the person representing or appearing for said Dunbar, assignee. That this affiant proceeded to the city of Zacatecas, in the Republic of Mexico, and there received from said Dwyer the sum of thirty-five thousand five hundred dollars ($35,500) in merchandise, in settlement of the claims he held against Dwyer, that the claim of Dunbar was embraced in this settlement. That, although the said Smyth did not hold the power of attorney of said Dunbar, assignee, he presumed he would be doing right in adjusting the same, predicating his acts upon the representations of the person above spoken of, who appeared as the agent of Dunbar. That this affiant gave to said Dwyer a conditional receipt respecting said claim of Dunbar. That this affiant sold the goods received from Dwyer to the best possible advantage, and for the principal sales received drafts upon Liverpool, which drafts have been paid and disbursed among the several creditors represented by this affiant. That the house of Kent, Lowber & Smyth, of the city of New York, were the recipients of the funds received by this affiant. That this affiant is informed and believes that all the funds received has been paid to the creditors of said

Dwyer, with the exception of the pro rata received for account of Dunbar, assignee of George C. Dunbar. The letter of this affiant to Charles Russell was written in reply to a letter of said Russell, wishing to know the circumstances respecting the settlement made in the Dunbar claim by me. This affiant is not acquainted with J. S. Ray or his signature. That the pro rata due the said Dunbar as assignee has never been paid back to said Dwyer by said Dunbar or any one else, as this affiant believes. That the house of Kent, Lowber & Co. succeeded to the house of Kent, Lowber & Smyth, and to the business of the same in the city of New York.

H. M. SMYTH.

And I, William F. Weeks, chief justice aforesaid, do hereby certify, that the reason for taking the foregoing deposition is, and the fact is, that the testimony of the said witness is material and necessary in the civil cause or suit in the caption of said deposition named, and that he lives in the city of San Antonio, in the county of Bexar and State of Texas. I further certify that no notification of the time and place of taking the said deposition was given to the adverse party or his attorney, they being more than one hundred miles from the place of taking the same at the time aforesaid. I further certify, that on the said day and year first above mentioned, I was attended by said witness, and thereupon the above deposition was taken and reduced to writing by me in the presence of said witness, and from his statements, and after carefully reading the same to the said witness, he subscribed his name thereto as above written. I have retained the said deposition in my possession, for the purpose of sealing up and directing the same, and after such sealing up and directing, placing the same in the post-office at the city of Galveston aforesaid, to be forwarded by mail to the clerk of the court for which the same was taken. And I do further certify that I am not of counsel or attorney for either of the parties in the said deposition or caption named, nor in any way interested in the event of the said cause or suit. The passages marked one, four, and five, were stricken out before signing.

To certify which, I hereunto assign my name, and affix the seal of the County Court of said County Court of said county, the day and year above written. WILLIAM F. WEEKS,

[SEAL.] Chief Justice Bexar County.

Letter of J. S. Ray, referred to.

New York, May 22, 1856.

T. A. Dwyer, Esqr.—

Dear Sir: Yours of April 26th has been received. We called on Mr. Tweedy as you requested. Mr. Dunbar, the assignee, being

absent at the time, I we could not join with the other creditors in their arrangements without consulting him. Since then I have seen Mr. Dunbar. He is disposed to arrange your indebtedness the same as other creditors. We hope you will not think, as we did not enter into the arrangement, that we were disposed to embarrass you. We desire that you may be able to arrange your affairs as will be satisfactory to yourself and creditors. Please let us hear from you.

You will please accept our best wishes. Respectfully,

J. S. RAY, for

WILLIAM H. DUNBAR, assignee of G. C. Dunbar.

P. S. If Mr. Dwyer is absent, please send this letter to him.

Power of Attorney to H. M. Smyth, referred to.

United States of America.

Know all men by these presents, That we, O. B. Tweedy & Co., Gardner, Greene & Co., Kent, Lowber & Co., Reid, Sprague & Co., L. Edgerton & Doane, I. F. Seymour & Co, William H. Dunbar, assignee of George Dunbar, Lyman Cook & Co., Thomas Brace & Co., Atwood, Barnes, Farmer & Co., Clapp, Kent & Beckley, Robertson, Hudson & Pulliam, Rankin, Duryear & Co., John Conklin & Co., T. Smith & Co., Stebbins, Morgan & Allen, George & Brothers, Edward Lambert & Co., have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Henry M. Smyth, of the city of New York, our true and lawful attorney for us, and in our name, place, and stead, ask, demand, require, have, take, sue for, recover, and receive, of and from Thomas A. Dwyer, of Corpus Christi, in the State of Texas, any sum or sums of money now due and owing unto us, or which may become due and owing unto us from said Dwyer, with power and authority to arrange, compound and compromise the same, or any part thereof, and receipts and acquittances thereof to make and to give. Giving and granting unto our said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as he might or could do if personally present, with full power and substitution, and revocation, hereby ratifying and confirming all that our said attorney, or his substitute, shall lawfully do, or cause to be done, by virtue hereof.

In witness whereof, we have hereunto set our hands, the 15th day of May, in the year one thousand eight hundred and fifty-six.

L. EDGERTON & DOANE,
CLAPP, KENT & BARCLAY,
LYMAN, COOKE & CO.
T. SMITH & CO.
R. ATLO TRUMBELL SMITH,
FARMER, BRACE & CO.
ROBERTSON, HUDSON & PULLIAM,

STEBBINS, MORGAN & ALLEN,
EDWARD LAMBERT & CO.
GARDNER, GREENE & CO.
O. B. TWEEDY & CO.
ATTWOOD, BARNES, FARMER & CO.
KENT, LOWBER & CO.
GEORGE & BROTHERS,
RANKIN, DURYEAR & CO.

Signed and sealed in presence of:
J. B. NONES,
WI. PULLER.

T. A. Dwight, Esq., in a'c with sundry persons.

May 6, '56.

Reed, Sprague & Co.					
To balance of a'c,		4459	09		
" note due May 9th, '56,		2435	41		
" " " "		486	06		
" June 6th " "		719	08	(carried over)	
Brought over					
September 21st	"	445	29	" 56 Credit	
December 15th	"	452	39	May 6. By cash p'd Ins. Co.	$461

Atwood, Barnes, Farmer & Co. 1856, am't of a'c due April 20th	$1005	03
Gardner, Green & Co. 1856, am't of a'c due May 12th,	1256	56
O. B. Tweedy & Co. " " " April 16th,	502	00
Edward Lambert & Co., to bill of merchandise, Nov. 16.	69	50
" " " protest, " 18,		78
" " 56 " note March 14,	604	76
" " " " " "	539	63
George & Brother. '55, May 16. To note due 19'56 March,	463	20
Slebbins, Morgan & Allen. '55, Nov. 16 To note due May 19, '56,	223	55
T. Smith & Co. '54, Dec. 48. To mdz. due from 28 '55,	56	86
" " " Aug. 2. " note Ap'l 5, '55,	233	24
Rankin, Duryear & Co. '55, May 16. To note due Jan. 19, '56	379	12
Farmer, Brace & Co. '55, Oct. 22. To mdz. 6 mo. Ap'l 25, '56,	140	42
" " " Aug. 1st. By cash,	2	10
Clapp, Kent & Buckley, '55, Dec'r 17. To mdz.	341	34
" " " '56, May 24. "	8072	89
Lyman, Cook & Co. '56, May 15. To amount due,	1325	58
Seymour & Co. '56, June 1st. To amount due,	1137	72

Robertson, Hudson & Pulliam.	'55, mdn.	due Nov. 17, '55,		205	47
" " "	Note,	March 19, '56,		3828	06
" " "	"	"		3825	98
" " "	"	"		3825	07
" " "	"	"		3528	03
" " "	"	"		927	27
L. Edgerton & Doane.	To bal.	due Mar. 24, '56,		12472	34
" "	"	May 16, '56,		477	50
Kent, Lowber & Co.	To bal.	due Feb. 13, '56,		6476	93

United States of America, State of New York, *ss.*

By this public instrument be it known to all whom the same doth or may in any wise concern, that I, Joseph B. Nones, a public notary in and for the State of New York, by letters patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify, that on the day of the date hereof the following named firms came before me, and acknowledged the annexed power of attorney, signed by them and made to Henry M. Smyth, to be the proper act and deed of each of the said firms, viz.: O. B. Tweedy & Co., Gardner, Greene & Co., Kent, Lowber & Co., Reid, Sprague & Co., L. Edgerton & Doane, J. H. Seymour & Co., William H. Dunbar, assignee of George Dunbar, Lyman, Cook & Co., Farmer, Brace & Co., Atwood, Barns, Farmer & Co., Clapp, Kent, & Buckley, Robertson, Hudson & Pulliam, Rankin, Duryea & Co., T. Smith & Co., Stebbins, Morgan & Allen, George & Brothers, Edward Lambert & Co.

In testimony whereof I have subscribed my name and caused my notarial seal of office to be hereunto affixed, the 15th day of May, in the year of our Lord one thousand eight hundred and fifty-six.

[SEAL.] J. B. NONES,
Notary Public, New York.

United States of America, State of New York, city and county of New York, *ss.*

By this public instrument, be it remembered that, on this fourteenth day of May, A. D. one thousand eight hundred and fifty-six, before me, the subscriber, Joseph B. Nones, a commissioner in and for the State of New York, appointed by the Governor of the State of Texas to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument, to be used or recorded in the said State of Texas, and to administer oaths and affirmations, take depositions, &c. &c., appeared O. B. Tweedy & Co., Gardner, Greene & Co., Kents, Lowber & Co., Reed, Sprague & Co., L. Edgerton & Doane, J. H. Seymour & Co., W. H. Dunbar, assignee of George Dunbar, Lyman, Cook & Co., Farmer, Brace & Co., Atwood, Barnes, Farmer & Co., Clapp, Kent & Beckley, Robertson, Hudson & Pulliam, Franklin, Duryea & Co., T. Smith & Co., Stebbins, Morgan & Allen, George & Brothers, and Edward Lam-

bert & Co., the persons described in, and who executed the annexed instrument, between them, as one of the parties thereto, and Henry M. Smyth, the other party thereto, and acknowledged to me that they executed the said instrument voluntarily and freely, for the uses and purposes therein stated.

And I further certify, that I know the persons who made the said acknowledgment, to be the identical persons described in, and who executed, the said annexed instrument.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the year and day first before written.

[SEAL.] J. B. NONES,

Commissioner of the State of Texas for the State of New York, as aforesaid.

The Receipt endorsed on Power Att'y to H. M. Smyth.

Received by Thomas Dwyer, Esq., thirty-five thousand five hundred dollars, in merchandise ($35,500), in full, for the annexed amounts to date, which amount includes the amount of W. H. Dunbar, assignee of G. Dunbar, whose power of attorney I do not hold, but whose agent said that W. Dunbar was willing to do what the balance of New York creditors were, in case the said Dunbar declines acceptance of the above composition; the *pro rata* due him is to be held subject to the order of said Dwyer.

Zacatecas, 20th July, 1856.

H. M. SMYTH, Attorney
C. B. Tweedy and others.

Witness: C. M. McDONALL.

And the said defendant further gave in evidence the depositions of Joseph Tracey and Elias M. Greene, which were as follows:—

Depositions of James Joseph Tracey and Elias M. Greene.

United States of America, State of New York, *ss.*

By this instrument, be it known to all whom the same doth or may in anywise concern, that I, Joseph B. Nones, public notary in and for the State of New York, by letters patent, under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify, that under and by virtue of the acts of Congress of the United States, approved 16th of September, 1850, by the thirty-first Congress, first session, entitled "An act to authorize notaries public to take and certify oaths, affirmations and acknowledgments in certain cases;" also another act, passed by the thirty-third Congress of the United States, first session, chapter 159, on the 29th July, 1854, entitled "An act supplementary to an act entitled An act to authorize notaries public to take and certify oaths, affirmations and acknowledgments in certain cases," thereby giving and granting to notaries public full powers and authority to take depositions, and to do such other

acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully take and do: did call and cause to be and personally appear before me at my office, in the city of New York, in the county and State as aforesaid, No. 262 Broadway, corner of Warren street, James Joseph Tracey and Elias M. Greene, to testify and the truth to speak on the part and behalf of defendant, in a certain suit or matter of controversy now depending and undetermined in the District Court of the United States for the Eastern District of Texas, at Galveston, in the State of Texas, and in the district aforesaid, wherein William H. Dunbar is plaintiff, and Thomas A. Dwyer is defendant. And the said witnesses being all of lawful age, and of the age severally noted in the testimony of each of the said witnesses, and each of whom, having been first by me cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controvery aforesaid, I did carefully examine each of the said witnesses, and each of whom did thereupon depose, testify, and say as follows, as by the annexed and following testimony will appear.

In testimony whereof, I have subscribed my name, and caused my notarial seal of office to be hereunto affixed, the 9th day of November, in the year of our Lord one thousand eight hundred and fifty-nine, in 84th year of the Independence of the United States. J. B. NONES, Notary Public, New York,

SEAL.] ex-officio U. States Com.,
No. 262 Broadway.

JAMES JOSEPH TRACY,
J. B. NONES, Com., &c.

United States of America.

In the District Court of the United States for the Eastern District of Texas, at Galveston, Texas.

[SEAL.]

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER.

State of New York, *ss*:

Depositions of the witnesses named in the caption annexed, and sworn to by them respectively, as therein stated, and as also stated in the closing certificate:—

James Joseph Tracy, on being duly sworn as aforesaid, on his oath saith:—

My name is James Joseph Tracy; I now reside in the city of New York; I know Thomas Dwyer, the above-named defendant; I cannot say if or not I know the plaintiff; and that in the month of April or May, 1856, I went in company with a Mr. Smyth, here in New York, to the place of business of Wm. H. Dunbar, the plaintiff in this case, in Broadway near John street; Mr. Dunbar was not

in, but I there saw and conversed with a gentleman who represented himself to me as the authorized agent of the said Dunbar, and of the assignee of said Dunbar, who had failed in business; I then and there entered into conversation with this gentleman; I explained to him that Mr. Smyth, then present with me, was about to go to Corpus Christi, Texas, as the agent of the New York creditors of said Dwyer, excepting said Dunbar, in which said Smyth was fully empowered to settle or compromise the claims of said creditors against said Dwyer, and I explained to him that the nature of our call was to obtain Mr. Dunbar's signature to said instrument; I do not know the name of the gentleman I spoke to as aforesaid, at Dunbar's, and who avowed himself as such agent.

JAMES JOSEPH TRACY.

(J. B. NONES, Com'r.)

Elias M. Green, being duly sworn, as aforesaid, on his oath, says:—

"My name is Elias M. Green; I reside in the city of New York; I am acquainted with defendant Dwyer; I do not personally know plaintiff, W. H. Dunbar; in about the last of May or first part of June, 1856, I was at Galveston, Texas, and was then and there advised by my partners in New York, of the fact of Mr. H. M. Smyth of New York being authorized by all the New York creditors to go to Corpus Christi, or Mexico, if necessary, and settle their claims against defendant, Dwyer, in any manner he [said Smythe] might think proper: at learning which, I immediately returned to New York. [I understood from all parties interested, that Mr. Dunbar was also a party to the arrangement]; and I also understood it from the representatives of Wm. H. Dunbar, as also from Mr. Geo. C. Dunbar himself. The part of the above sentence in brackets was excluded.

And I am also aware of the fact, that the amount coming to Mr. Dunbar, according to the pro rata arrangement, was deposited by said Smyth with the house of Kent, Lowber & Smyth, in New York, subject to Mr. Dunbar's order, upon his complying with the terms of the arrangement with the rest of the creditors, and that said deposit remained there, subject to Dunbar's order as aforesaid 'til a few months since, when it was withdrawn, I think, by Mr. Dwyer himself, upon his knowledge of this suit being commenced; I am one of the firm of Oliver B. Tweedy & Co., and my firm has settled their claim on Dwyer through said Smyth, at the same rate as that set apart for Dunbar, and all the parties interested as creditors in New York settled at the same rate, except Dunbar.

ELIAS M. GREENE.

Fees paid by defendant, $10. [SEAL.] J. B. NONES, N. Pub.

(J. B. NONES, ex-officio U. S. Com'r.)

United States of America, State of New York, *ss.*

By this public instrument, be it known to all whom the same doth or may in any wise concern, that I, Joseph B. Nones, a public notary in and for the State of New York, by letters patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify, that under and by virtue of the acts of Congress of the United States, approved the 16th of September, 1850, by the thirty-first Congress, the first session, entitled "An act to authorize notaries public to take and certify oaths, affirmations and acknowledgments, in certain cases;" also another act passed by the thirty-third Congress of the United States, first session, chapter 159, on the 29th July, 1854, entitled "An act supplementary to an act entitled An act to authorize notary publics to take and certify oaths, affirmations, and acknowledgments in certain cases;" thereby giving and granting to notaries public full powers and authority to take depositions, and to do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits, may now lawfully take and do.

I do further certify that the reason for taking the annexed and foregoing depositions is, and the fact is, the witnesses (named, sworn, and examined in said annexed depositions) material and necessary in the cause, in the caption of the said depositions named, and that they live in the city, county, and State of New York, more than 100 miles from the place where the trial of the said suit is to be had, to wit, the city of Galveston and State of Texas.

I still further certify that no notification of the time and place of taking the said depositions signed by me, was made out and served on the adverse party to be present at the taking of said depositions, and to put interrogatories if he or they might think fit.

I further certify that on the 19th day of November, A D. 1859, I was attended by James Joseph Tracy and Elias M. Greene, the witnesses named in the caption, and whose testimony is hereto annexed, who were all of sound mind and lawful age, and the said witnesses were all by me first carefully examined, and cautioned, and each sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions by me reduced to writing in presence of each of the said witnesses, each subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of transmitting the same with my own hand to the clerk of the court for which the same was taken.

I still further certify that I am not of counsel nor attorney for either of the parties in said depositions or caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have subscribed my name, and caused my notarial seal of office to be hereunto affixed, the 9th day of Novem-

ber, in the year of our Lord one thousand eight hundred and fifty-nine, in the 84th year of the independence of the United States.

[L. S.] J. B. NONES,
Notary Public, New York,
ex-officio U. S. Commissioner, No. 262 Broadway.

Deposition of Charles Russell.

And the defendant further offered in evidence the deposition of William Russell, which was as follows:—

The United States of America, Eastern District of Texas.

Be it remembered, that on the 25th day of December, A. D. 1859, at the city of Corpus Christi, in the district aforesaid, before me, Wm. C. Docharty, Jr., a commissioner of affidavits and bail in civil causes, duly appointed by the United States District Court for the Eastern District of Texas, personally appeared Charles Russell, to me well known, of sound mind and lawful age, witness for the defendant in a civil suit now pending in the District Court of the United States for the Eastern District of Texas aforesaid, wherein William H. Dunbar is plaintiff, and Thomas A. Dwyer is defendant, and the said witness being by me first carefully examined and cautioned, and duly sworn to testify the whole truth, and nothing but the truth, did depose and say as follows:—

"I am thirty-seven years of age; am not interested in this suit. While acting as the agent of Thomas A. Dwyer, the defendant, in the month of June, 1856, a few days after Mr. Smyth passed through Corpus Christi, Texas, on his way to Mexico, to see Mr. Dwyer, I received a number of letters through the post office, among which there was one addressed to Mr. Smyth, from Mr. Ray, agent of Mr. Dunbar, which I opened through mistake, and finding it had reference to Mr. Dunbar's business I read it, and forwarded it to Mr. Smyth, in Mexico, with an explanatory note. The contents of said letter was to the best of my recollection in substance as follows: Mr. Dunbar has returned to the city (New York), and after conversing with him relative to the Dwyer claim, he says any settlement you may make with Dwyer will be satisfactory to him.

CHARLES RUSSELL.

And I, the said William C. Docharty, Jr., a commissioner as aforesaid, do certify that the reason for taking the foregoing deposition of the said witness, Charles Russell, is, that the same is necessary for the defendant in the said suit in the caption mentioned, and that the said witness lives in the county of Nueces, State of Texas, more than one hundred miles from the city of Galveston, the place of trial of said civil suit, where it is pending.

I further certify that no notification was given to the adverse party to be present at the taking of said deposition, and put interrogatories if he should think fit—William H. Dunbar, the said

adverse party, nor any attorney of his, residing or being within one hundred miles of the city of Corpus Christi aforesaid; that the said witness, Charles Russell, was first carefully examined and cautioned, and duly sworn by me to testify the whole truth, and that the preceding deposition of said witness was reduced to writing by me, in the presence of the said witness, and from his statements, and after being carefully read over to and approved by said witness, he subscribed the same in my presence, as the same appears; and I have retained the said deposition in my possession without alteration, for the purpose of sealing up and directing the same, with this certificate of the reasons aforesaid for taking said deposition, with my own hand, to the court for which the same was taken.

I further certify that I am not of counsel or attorney to any one of the parties to said civil suit, or in any way interested in the event thereof.

Given under my hand this 24th day of December, 1859.

Fee, 1 46. WM. C. DOCHARTY, JR.,
Com'r Eastern District of Texas.

But the plaintiff, by his counsel, objected, that said deposition did not sufficiently show, nor was it proved that the letter therein mentioned was written or sent by the authority of said plaintiff, and that the deposition was therefore irrelevant and inadmissible, and the court upon such objection excluded the deposition, and refused to admit it as evidence; to which ruling of the court the defendant, by his counsel, then, and before the jury retired, excepted, and now tenders his bill of exception.

And after the said defendant had introduced his evidence as aforesaid, the plaintiff gave in evidence the deposition of J. S. Ray, which was as follows:—

The Deposition of J. S. Ray.

United States of America, State of New York, *ss:*
Southern District of New York.

By this public instrument, be it known to all whom the same doth or may in anywise concern, that I, John Bissell, a public notary in and for the State of New York, by letters patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify, that under and by virtue of the acts of the United States, approved 16th September, 1850, by the thirty-first Congress, first session, entited "An act to authorize notaries public to take and certify oaths, affirmations and acknowledgments in certain cases," and another act passed by the thirty-third Congress of the United States, first session, chapter 159, on the 29th of July, 1854, entitled "An act supplementary to an act entitled 'an act to authorize notaries public to take and certify oaths, affirmations, and acknowledgments in certain cases,'" thereby giving and granting to notaries public full powers and authority to take

depositions, and to do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgments of bail and affidavits may now lawfully take and do, I did call and cause to be and personally appear before me, at eleven Wall Street, in the city of New York, in the county and State aforesaid, in said district, *John S. Ray*, to testify, and the truth to say, on the part and behalf of the plaintiff, in a certain suit or matter of controversy, now depending and undetermined, in the District Court of the United States for the Eastern District of Texas, at Galveston in the district aforesaid, wherein William H. Dunbar, assignee, is plaintiff, and Thomas A. Dwyer is defendant; and the said witness being of lawful age, and of the age noted in the testimony of the said witness, and whom having been by me first cautioned and sworn to tell the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said witness, who did thereupon depose, testify and say as follows, as by the annexed and following testimony will appear.

In testimony whereof, I have hereunto subscribed my name, and caused my notarial seal of office to be hereunto affixed,
[SEAL.] the 14th day of December, in the year of our Lord one thousand eight hundred and fifty-nine.

JOHN BISSELL, Notary Public, New York.

And first, John S. Ray, of the city of Utica, Oneida County, State of New York, of the age of forty-six years, being first cautioned and sworn as aforesaid in the matter aforesaid, and examined as aforesaid, deposes, testifies, and says, in answer to the first interrogatory hereunto annexed, that he knows William H. Dunbar, but does not know Mr. Dwyer. I know Mr. William H. Dunbar as the assignee of Mr. George C. Dunbar.

To the 2d interrogatory he saith: I was employed by William H. Dunbar as the assignee of said George C. Dunbar, in the year 1856, in the capacity of agent, to assist him in settling up the indebtedness of George C. Dunbar.

To the 3d interrogatory he saith: I do know that plaintiff, as such assignee, held claims against Thomas A. Dwyer in 1856. I think there were three notes and one account, amounting, in the whole, to over three thousand dollars.

To the 4th interrogatory he saith: Said claims were never, to my knowledge, settled or paid.

To the 5th interrogatory he saith: Said Dwyer wrote to said plaintiff, requesting him to attend a meeting of his creditors, at Tweedy & Co.'s in this city. I, in behalf of plaintiff, who was out of town, attended that meeting. Dwyer was not present at it; nearly all the creditors of said Dwyer present and represented at said meeting, authorized Mr. Smyth to call on defendant and make the best settlement he could for the creditors, in New York, of defendant.

Mr. Dunbar was not present; and I did not assent to anything that was said or done at that meeting.

To the 6th interrogatory he saith: I did write to said Dwyer on my own responsibility, without consulting Mr. Dunbar at all. I wrote him in regard to said claim.

To the 7th interrogatory he saith: W. H. Dunbar never authorized me to write to defendant that he would accept any settlement made by the other creditors of Thomas A. Dwyer. Henry M. Smyth was not authorized by me, or, so far as my knowledge extends, by Mr. Dunbar, to represent Mr. Dunbar in effecting a settlement of plaintiff's claim against defendant.

To the 8th interrogatory he saith: I attended the meeting of Dwyer's creditors merely to learn what it was proposed to have done. I refused to join Dwyer's other creditors in authorizing Mr. Smyth, or any one else, to effect a settlement. I stated to the meeting at the time, that Mr. W. H. Dunbar was under an injunction by the court, prohibiting him from acting in his capacity as assignee for the time being. I reported to Mr. Dunbar when he returned to town, what had been done at said meeting and the stand I had taken thereat. Said Smyth was one of the firm of Kent, Lowber & Smyth. After said Smyth's return from seeing Dwyer, Mr. Dunbar was notified, that there was a dividend payable to him from Dwyer's estate of $84 00, or thereabouts, payable at Kent, Lowber & Smyth's store. I went there to get it. Mr. Smyth was not there; but one of the firm wanted to pay said dividend on condition of Mr. Dunbar's coming into the general arrangement, which he said had been made by all the other creditors of Dwyer. I reported this to said Dunbar, and he refused to accept said dividend on such conditions.

To the 1st interrogatory he saith: After looking at the annexed letter, that he wrote, signed, and mailed to its destination, a letter substantially if not actually the same as the said copy, and he has no reason to doubt that it is a copy of the original letter so written by deponent; said original was all in deponent's handwriting and written by him; he did sign either "W. H. Dunbar, by J. S. Ray, or as stated in the interrogatory.

To the 2d interrogatory he saith: W. H. Dunbar expressed dissatisfaction with the settlement made by H. M. Smyth, as soon as he knew of it, and said he never had, and never should give Smyth authority to make it; he said he supposed Dwyer was able to pay his debts, and that he had been so informed.

To the 3d interrogatory he saith: In the meeting of the creditors of T. A. Dwyer above referred to, before said Smyth went out to Mexico, I represented I was present for W. H. Dunbar, assignee of G. C. Dunbar. Mr. Smyth did not go out to Mexico with my consent to settle with T. A. Dwyer.

To the 4th interrogatory he saith: I have within the last two years had conversations with said W. H. Dunbar about the subject-

matter of this suit. The last conversation I had with him on the subject was nearly or quite a year ago. He did not, in either of said conversations, ask me to state on oath that he did not authorize me to write the letter above mentioned, or to deny on oath that H. M. Smyth was authorized to settle with Dwyer by him, or by me for him, but such were the facts in the case.

J. S. RAY.

Interrogatories.

The United States of America, Eastern District of Texas.

In District Court, at Galveston.

WILLIAM A. DUNBAR, Assignee,
vs.
THOMAS A. DWYER.

Interrogatories to be propounded by the plaintiff to John S. Ray, who resides in the city of Utica, in the State of New York, his answers thereto to be read in evidence on the trial of the above entitled suit.

Int. 1st. Do you or not know the parties to this suit?

Int. 2d. By whom were you employed, if by any one, in the year 1856? If by plaintiff, please say in what capacity.

Int. 3d. Do you or not know whether plaintiff held any claims against Thomas A. Dwyer, in 1856? if yes, please say what claim.

Int. 4th. Do you or not know whether said claims were ever settled or paid?

Int. 5th. Do you or not recollect whether any proposition for a settlement of said claims was made to plaintiff, and whether or not said proposition was acceded to by plaintiff? Please say all you know about any proposition for settlement made in 1856—whether or not you attended a meeting of defendant's creditors, and if you did, state what transpired at said meeting.

Int. 6th. Please say whether or not you ever wrote to defendant, Dwyer, on the subject, and say also whether, if you did write, you wrote by the request or by the authority of plaintiff, W. H. Dunbar, or not.

Int. 7th. Did or not W. H. Dunbar ever authorize you to write to defendant that he would accept any settlement made by the other creditors of Thomas A. Dwyer, and say whether Henry M. Smyth was authorized by you or by Mr. Dunbar to represent him in effecting a settlement of plaintiff's claim against defendant?

Int. 8th. Please state any matter or thing you may know that will benefit the plaintiff in this suit.

EDWARD T. AUSTIN, Attorney for plaintiff.

Cross-interrogatories.

Cross-interrogatories to J. S. Ray.

First cross-interrogatory. Look at a copy of a letter purporting to be written by you to the defendant, Thomas A. Dwyer, and say whether or not you did write, and sign, and mail to its destination the original letter of which the copy is annexed. Is it not all in your handwriting, and written by you? Did you not sign it, J. S. Ray for W. H. Dunbar, assignee of G. C. Dunbar?

Second cross-interrogatory. When, for the first time, did you know W. H. Dunbar express any dissatisfaction with the settlement made by H. M. Smyth with T. A. Dwyer, and what was the cause of such dissatisfaction? What did W. H. Dunbar say was his objection to said settlement?

Third cross-interrogatory. In the meetings of the creditors of T. A. Dwyer, before H. M. Smyth went to Mexico, who represented or was present for W. H. Dunbar, or George C. Dunbar? Did not H. M. Smyth go out to Mexico with the consent of all the creditors represented at those meetings, to settle with T. A. Dwyer?

Fourth cross-interrogatory. Have or not had any conversation with W. H. Dunbar during the last two years about the subject-matter of this suit? If so, when did you last converse with said Dunbar about it? Did he not in one of those conversations ask to state on oath that he did not authorize you to write the letter above mentioned? Did he not ask you to deny on oath that H. M. Smyth was authorized to settle with Dwyer by him, said Dunbar, or by you for him?

ALLEN & HALE, for defendant.

We consent that the deposition of J. S. Ray may be taken by any U. S. Commissioner or Notary Public under the practice of courts of the United States in taking depositions *de bene esse*, without further notice to us or the defendant.

ALLEN & HALE, for defendant.

Letter of J. S. Ray referred to.

New York, May 22, 1856.

T. A. DWYER, ESQ.:

Dear Sir: Yours of April 26th has been received. We called on Mr. Tweedy as you requested. I, we could not join with the other creditors in their arrangements without consulting him. Since then I have seen Mr. Dunbar. He is disposed to arrange your indebtedness the same as the other creditors. We hope you will not think, as we did not enter into the arrangement, that we were disposed to embarrass you. We desire that you may be able to arrange your

affairs as will be satisfactory to yourself and creditors. Please let us hear from you. You will please accept our best wishes.

Yours very respectfully,
J. S. RAY, for W. H. Dunbar,
Assignee of Geo. C. Dunbar.

Exhibit referred to in the depositions taken before me.
JOHN BISSELL, Notary Public.

United States of America, City, County, and State of New York, *ss.*

Southern District of New York. By this public instrument be it known to all whom the same doth or may in anywise concern, that I, John Bissell, a public notary in and for the State of New York, by letters patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, in said district, do hereby certify, that, under and by virtue of the acts of Congress of the United States, approved 16th of September, 1850, by the thirty-first Congress, first session, entitled "An act to authorize notaries public to take and certify oaths, affirmations, and acknowledgments in certain cases," and another act passed by the thirty-third Congress of the United States, first session, chapter 159, on the 29th July, 1854, entitled "An act supplementary to an act entitled 'An act to authorize notaries public to take and certify oaths, affirmations, and acknowledgments in certain cases,'" thereby giving and granting to notaries public full powers and authority to take depositions, and to do such other acts in relation to evidences to be used in the courts of the United States, in the same manner and with the same effect as commissioners to take acknowledgment of bail and affidavits may now lawfully take and do, I took the foregoing deposition. I do further certify, that the reason for taking the foregoing and annexed deposition is, and the fact is, the witness (named, sworn, and examined deposition) is material and necessary in the cause in the caption of the said deposition named, and that he lives more than one hundred miles from the place of trial.

I still further certify that notification of the time and place of taking the said deposition was waived by a consent subjoined to the interrogatories.

I further certify that on the 14th day of December, A. D. 1859, I was attended by the witness named in the caption, and whose testimony is hereto annexed, who was of sound mind and lawful age; and the said witness by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; and the deposition was by me reduced to writing in the presence of the said witness—he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of directing the same with my own hand to the court for which the same was taken.

I still further certify, that I am not of counsel nor attorney for

either of the parties in said deposition or caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have subscribed my name and caused my notarial seal of office to be hereunto affixed, the 14th day of December, in the year of our Lord one thousand eight hundred and fifty-nine, in the year of the independence of the United States.

[SEAL.] JOHN BISSELL,
Notary Public, New York.

Fees $11.00. Paid by Pl'ff Bissell.

And the plaintiff, under the practice of Texas, and as a denial of the pleas of defendant, setting up the letter of Ray and the power of attorney and the receipt of Smyth as the act of plaintiff, also read in evidence the affidavit of plaintiff or plea of *non est factum*, which was follows:—

Replication and Plea of *non est factum* referred to.

The United States of America, Eastern District of Texas, fall term, 1859.

WILLIAM H. DUNBAR
vs.
THOMAS A. DWYER. } District Court of the United States for the Eastern District of Texas.

And now comes William H. Dunbar, the plaintiff in the above entitled cause, and for plea to the allegation of settlement in defendant's amended answer contained, and to the amendment filed 10th February, 1859, that he denies all the allegations therein contained, and on oath says that the letter referred to in said amendments, dated 22d May, 1856, directed to T. A. Dwyer, and signed J. S. Ray, for W. H. Dunbar, assignee of Geo. C. Dunbar, was not written by him, nor by his authority. He further says that he never authorized Henry M. Smyth, or any other person, to compound or compromise or settle the claims he held against Thomas A. Dwyer, and on which this suit is founded; and further he says that he did not authorize any one to appear for him at the meeting of the creditors of Thomas A. Dwyer; and that he has not received a dollar of the composition of said claims made by H. M. Smyth without his authority. WILLIAM H. DUNBAR.

United States of America, Massachusetts District, Boston, Nov. 8th, 1859.

Then personally appeared the said Wm. H. Dunbar, and made solemn oath that the within affidavit by him subscribed is true.

I have hereunto subscribed my name and affixed the seal of the United States District Court for the said District of Massachusetts, the 8th day of November, 1859.

[SEAL.] Attest: ELISHA BASSETT,
Clerk Dist. Court U. S., Mass. Dist.

And thereupon upon this testimony the plaintiff requested the court to instruct the jury as follows:—

Instruction for Plaintiff.

W. H. DUNBAR
vs.
THOMAS A. DWYER.

Plaintiff asks the court to charge the jury—

"That to bind the plaintiff by the acts of H. M. Smyth that the authority of Dunbar to said Smyth must be proved.

That the representations of any person not proved to have been authorized by W. H. Dunbar, are not evidence against the plaintiff.

That the power of attorney is not evidence against William H. Dunbar, unless signed by him.

If the jury find from the evidence that the defendant executed and delivered the notes as alleged, and that he has not paid the same, they will find for the plaintiff.

That to bind Dunbar by the compromise, defendant must prove an acceptance by Dunbar of the settlement." And the court gave the instructions so requested to the jury, and the defendant requested the court to instruct the jury as follows:—

Instructions asked by Defendant.

"That the jury find from the evidence, that J. S. Ray was permitted by W. H. Dunbar, and with his knowledge, to act for him and represent him in his business; and if they also find that the said Ray, in the name of said Dunbar, did authorize Smyth to settle with the defendant Dwyer, then Dunbar will be bound by such act of Ray, notwithstanding that Dunbar may not have expressly authorized said Ray to do so, or may have disapproved of said act afterwards.

If any person publicly acts with the knowledge of another, and without objection as the general agent or manager for that other, then such principal will be bound by the act of such agent, although he may not approve of the particular acts of such agent.

ALLEN & HALE, for defendant.

But the court refused to give the jury the said instructions; to which rulings of the court, giving the several instructions requested by the plaintiff, and refusing the several instructions requested by the defendant, the said defendant, by his counsel, then and before the jury retired, excepted, and now tenders his bill of exceptions. And the defendant accordingly prays that his bill of exceptions may be now allowed, signed, sealed, and made a part of the record of this cause, which is now done.

JOHN C. WATROUS. [SEAL.]

Feb. 29th, 1860.

And afterwards, on the first day of March, 1860, the defendant,

Thomas A. Dwyer, sued out a writ of error, a copy of which was filed, as follows :—

The United States of America, *ss.*

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Eastern District of Texas :—

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is before you in the said District, between William H. Dunbar, plaintiff, and Thomas A. Dwyer, as defendant, a manifest error hath happened, to the great damage of the said Thomas A. Dwyer, as by his complaint appears :

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause farther to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Galveston, this first day of March, A. D. one thousand eight hundred and sixty, and the seal of office.

[SEAL.] JAMES LOVE, Clerk.

And afterwards, on the same day, a citation in error was issued in this cause, in words and figures as follows :—

Citation.

The United States of America.

The President of the United States of America to William H. Dunbar, or Edward T. Austin, his attorney of record, greeting :—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, at Galveston, wherein Thomas A. Dwyer is appellant, and you are appellee, to show cause, if any there be, why a judgment by said court, on the 21st day of February of the year of our Lord one thousand eight hundred and sixty, against said appellant, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness Hon. Roger B. Taney, Chief Justice of the Supreme

Court of the United States, at the city of Galveston, this first day of March, A. D. 1860.

[SEAL.] JOHN C. WATROUS, U. S. Judge.

And afterwards, on the 29th day of February, A. D. 1860, the defendant filed a power of attorney, in words and figures as follows:—

Power of Attorney from Dwyer to Hale.

Know all men by these presents, that I, Thomas A. Dwyer, of the city of Corpus Christi, county of Nueces, and State of Texas, divers good causes and considerations me hereunto moving, have made, nominated, constituted, and appointed, and do by these presents, make, nominate, constitute, and appoint William G. Hale, of the city of Galveston, my true and lawful attorney in fact, giving and granting unto him full power and authority for me and in my name and stead, and as my act and deed, or otherwise to execute any bond or bonds which may be required or necessary for the purpose of suing out and prosecuting a writ of error to the Supreme Court of the United States, to act as a supersedeas to any judgment that may be rendered by the District Court of the United States for the Eastern District of Texas, at Galveston, against me at the suit of William H. Dunbar, in a cause depending in the said court, and also all other acts or things in or about the premises to do and perform, as fully and effectually to all intents and purposes as I could or might, if personally present, so that he may in no event be restricted in acting for want of power or authority, hereby ratifying and confirming, and agreeing to ratify and confirm all and whatsoever my said attorney shall or may lawfully do or cause to be done by virtue of the presents.

In testimony of all which I have hereunto signed my name, and affixed my seal at Corpus Christi aforesaid, this the twenty-third day of January, A. D. 1860.

THOMAS A. DWYER. [SEAL.]

In presence of WM. C. DOCHARTY,
E. B. MOSELEY.

The State of Texas, County of Nueces.

I, the undersigned authority, duly commissioned and qualified, certify that on this day, in said county and State, before me personally came and appeared Thomas A. Dwyer, to me well known, and who thereupon acknowledged that he had executed the foregoing power of attorney for the consideration and purposes therein stated.

In faith whereof I hereunto sign my name and affix the seal of office at Corpus Christi, the 22d Jan'y, A. D. 1860.

[SEAL.] EDWARD B. MOSELEY,
Not. Pub. Nueces County, Texas.

And afterwards, on the 29th day of February, A. D. 1860, the defendant filed a power of attorney, in words and figures as follows:—

Power of Attorney from Philip N. Luckett and William S. Shaw to William G. Hale.

Know all men by these presents, that we, Philip N. Luckett and William S. Shaw, both of the city of Corpus Christi, county of Nueces and State of Texas, divers good and sufficient causes and considerations us hereunto moving, have made, nominated, constituted, and appointed, and do by these presents make, nominate, constitute and appoint William G. Hale, Esq., of the city of Galveston, State of Texas aforesaid, our true and lawful attorney in fact, giving and granting unto him full power and authority for us, and in our names and stead, and as our acts and deeds, or otherwise to execute any bond or bonds which may be required or necessary, for the purpose of suing out and prosecuting a writ of error to the Supreme Court of the United States, to act as a supersedeas to any judgment that may be rendered by the District Court of the United States for the Eastern District of Texas, at Galveston, against Thomas A. Dwyer at the suit of William H. Dunbar, in a cause depending in the said court, and attorney or attorneys under him, said Hale, to appoint for said purposes, and again at his pleasure to revoke, and finally to do and perform all acts and things touching the premises, as fully to all intents and purposes as we could or might, if personally present, so that neither he nor his substitute or substitutes may, in any event, be restricted in acting for want of power or authority, hereby ratifying and confirming, and agreeing to ratify and confirm all and whatsoever our said attorney and his substitutes, or any of them, shall or may do lawfully, or cause to be done in or about the premises, by virtue of these presents.

In testimony of all which we have hereunto signed our names and affixed our seals at Corpus Christi aforesaid, this, the 23d day of January, A. D. 1860.

P. N. LUCKETT, [SEAL.]
W. S. SHAW. [SEAL.]

Executed and delivered in presence of
W. C. DOCHARTY,
E. B. MOSELEY.

The State of Texas, county of Nueces.

I, the undersigned authority, duly commissioned and qualified, certify, that on this day, in said county and State, before me personally came and appeared Philip N. Luckett and William S. Shaw, who are to me well known, and who thereupon acknowledged that they had executed the foregoing power of attorney to Wm. G. Hale for the considerations and purposes therein stated.

In testimony of all which I have hereunto signed my name and affixed my seal of office at Corpus Christi, the 23d Jan'y, A. D. 1860.

[SEAL.] EDWARD B. MOSELEY,
Not. Pub., Nueces county, Texas.

And afterwards, on the 29th day of February, A. D. 1860, the defendant filed a power of attorney, as follows:—

Power of Att'y of Henry Redmond to Wm. G. Hale.

Know all men by these presents, that I, Henry Redmond, of Zapata county, in the State of Texas, have constituted and appointed, and by these do constitute and appoint William G. Hale, of the city of Galveston and State of Texas, to be my true and lawful attorney, for me and in my name to sign any bond or bonds which may be necessary for the purpose of taking an appeal to act as a supersedeas on any judgment which may be recovered by William H. Dunbar against Thomas A. Dwyer, in a suit pending between said parties in the District Court of the United States for the Eastern District of Texas, at Galveston, so that I shall thus be made a surety on said bond or bonds for such purpose, hereby ratifying and confirming whatever my said attorney may do in my name in pursuance of this power.

Witness my hand and seal, this 31st day of Dec., A. D. 1859.

HENRY REDMOND. [SEAL.]

Witness:

WM. G. HALE.

And afterwards, on the 29th day of February, A. D. 1860, the defendant filed a bond for appeal, in words and figures as follows:—

Bond for Appeal.

Know all men by these presents, that we, Thomas A. Dwyer, Henry Redmond, P. N. Luckett and William S. Shaw, all of the State of Texas, residing in the county of Nueces, are held and firmly bound unto William H. Dunbar, of the city and State of New York, in the full and just sum of eight thousand dollars, to be paid to the said William H. Dunbar, his certain attorney, executors, administrators or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents; sealed with our seals, and dated this 28th day of February, in the year of our Lord one thousand eight hundred and sixty.

Whereas, lately at a term of the District Court of the United States for the Eastern District of Texas, at Galveston, on the 21st day of February, in the year aforesaid, in a suit depending in said court between said William H. Dunbar as plaintiff, and Thomas A. Dwyer as defendant, judgment was rendered against the said Thos. A. Dwyer; and the said Thomas A. Dwyer having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to supersede and reverse the judgment in the aforesaid suit, and a citation directed to the said William H. Dunbar, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, on the first Monday of December next:

Now the condition of the above obligation is such, that if the said Thomas A. Dwyer shall prosecute his suit with effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void, otherwise remain in full force and virtue.

THOMAS A. DWYER, [SEAL.]
HENRY REDMOND, [SEAL.]
P. N. LUCKETT [SEAL.]
W. S. SHAW, [SEAL.]
By their attorney in fact,
WILLIAM G. HALE. [SEAL.]

Witness:
JAMES LOVE, Clerk.

The United States of America, Eastern District of Texas.

United States District Court at Galveston:

I, James Love, Clerk of the United States District Court for the Eastern District of Texas, at Galveston, certify that the foregoing is a true and perfect transcript of the record and all the proceedings in said court, containing sixty-six pages, in the case of William H. Dunbar *vs.* Thomas A. Dwyer, No. 676 on the law docket.

In testimony whereof, I hereunto subscribed my name as clerk, and have caused the seal of the court to be affixed on the 14th day of November, A. D. 1860, and of the 85th year of the Independence of the United States of America.

[SEAL.] JAMES LOVE, Clerk.

The United States of America, *ss.*

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Eastern District of Texas, greeting:—

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is before you in the said district between William H. Dunbar as plaintiff and Thomas A. Dwyer as defendant, a manifest error hath happened, to the great damage of the said Thomas A. Dwyer, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held, that the record and proceedings being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Galveston, this first day of March, A. D. one thousand eight hundred and sixty, and seal of office affixed. JAMES LOVE, Clerk.

Allowed by JOHN C. WATROUS,
U. S. Judge, E. D. Texas.

The United States of America.

The President of the United States of America to William H. Dunbar, or Edward T. Austin his attorney of record, greeting:—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, at Galveston, wherein Thomas A. Dwyer is appellant and you are appellee, to show cause, if any there be, why a judgment rendered by said court on the 21st day of February of the year of our Lord one thousand eight hundred and sixty, against said appellant, should not be reversed, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, at the city of Galveston, this first day of March, A. D. 1850 JOHN C. WATROUS,
[SEAL.] U. S. Judge.

Galveston, November 15th, 1860.

I acknowledge due service of the within citation as attorney of record for the defendant in error.

EDWARD T. AUSTIN,
Att'y of Record for Dunbar.

Issued March 1st, 1860. JAMES LOVE, Clerk.

Filed 10 Dec. 1860.



Supreme Court of the United States.

DECEMBER TERM, 1866. No. 56.

THOMAS A. DWYER, Plff. in Error,
Against
WILLIAM H. DUNBAR, Deft. in Error.

Writ of Error to District Court of U. S. for Eastern District of Texas.

Supreme Court of the United States.

DECEMBER TERM, 1866. No. 56.

THOMAS A. DWYER, Pltf. in Error,
Against
WILLIAM H. DUNBAR, Deft. in Error.

Writ of Error to District Court of U. S. for Eastern District of Texas.

The action is on two notes of Dwyer to George C. Dunbar, each dated New York, 21st of September, 1854, payable ten months after date, for $2,476.73. The Defendant in his answer (p. 9) says that after the maturity of the notes Henry M. Smyth, by the Plaintiff's authority, and acting for him, made and carried into effect a general settlement of the Defendant's indebtedness to the other creditors in New York, and to the Plaintiff, and signed and gave to him the following acquittance and receipt, to wit:

"Received of Thomas A. Dwyer, Esq., $35,500 in merchandise, in full for the annexed amounts to date, which amount includes the amount of Willian H. Dunbar, assignee of George Dunbar, whose power of attorney I do not hold, but whose agent said that Wm. Dunbar was willing to do what the balance of New York creditors were. In case said Dunbar declares acceptance of the above composition, the pro rata due him is to be held subject to the order of said Dwyer.

"H. M. Smyth, attorney, C. B. Tweedy & Co., and others. Zacatecas, 21st July, 1856."

The Defendant says (p. 11) that before this receipt was signed and given, the Plaintiff, by a letter dated on the 23d

of May, 1856, and written and signed and sent to Defendant by J. T. Ray, acting for and by the authority of Plaintiff, authorized Defendant to make the settlement set forth in said receipt, and thereby sanctioned and approved in advance said setttlement and compromise. Defendant also says (p. 10) that Plaintiff has not, since the execution of said receipt, declared acceptance of the compromise therein, or refused to receive his pro rata share as expressed therein, or notified Defendant of such refusal, or offered to return such share, but, on the contrary, has ratified said settlement and composition.

The jury empannelled to try the issue joined on this plea found for the Plaintiff, and judgment was rendered on the verdict. The bill of exceptions, (p. 16 to 37,) after stating that the Plaintiff gave in evidence the notes described in the petition, and proved the rate of exchange on New York, sets forth that the Defendant offered in evidence the deposition of Smyth, (p. 16,) together with a letter (p. 18) signed by Smyth and attached and referred to in the deposition; but objection was made on Plaintiff's part to the admission of said letter in evidence on the ground that it was not stated on oath by Smyth that the statements of said letter were true: and the Court refused to admit said letter in evidence and excluded the same, to which ruling the Defendant then, and before the jury retired, excepted. (P. 19.)

Defendant then read (p. 19) the said deposition (p. 26) and the letter of J. S. Ray thereto appended, (p. 212) but without said letter of Smyth, and gave in evidence the power of attorney (p. 22 to 25) therein referred to made by certain creditors of Defendant to Smyth, with the certificate thereto appended and the receipt therein enclosed; and Defendant further gave in evidence the depositions of J. J. Tracey and E. M. Green (p. 29, 71); and offered in evidence the deposition of Charles Russell (p. 29); but the Plaintiff objected that said deposition did not sufficiently show, nor was it proved, that the letter therein mentioned was written or sent

by Plaintiff's authority, and that the deposition was therefore irrelevant and inadmissible, and the Court upon such objection excluded the deposition, to which ruling Defendant (p. 30) then, and before the jury retired, excepted.

Afterwards Plaintiff gave in evidence the deposition of Ray (p. 30–1.) And the Plaintiff, under the practice of Texas, and as a denial of Defendant's plea setting up the letter of Ray and the power of attorney and the receipt of Smyth as the act of Plaintiff, also read in evidence the affidavit of Plaintiff (p. 39.) And thereupon the Court gave certain instructions requested by plaintiff, (p. 37,) to which rulings the Defendant then, and before the jury retired, excepted (p. 37.)

Points and Authorities.

1. The Plaintiff having taken the deposition of Ray, and it appearing (p. 31) in answer to 2d interrogatory to Ray that he was employed by Wm. H. Dunbar as the assignee of George C. Dunbar, in the year 1856, in the capacity of agent to assist him in settling up the indebtedness of George C. Dunbar; and (p. 32) in answer to 3d cross-interrogatory, that on the meeting of Dwyer's creditors Ray represented and was present for W. H. Dunbar, assignee of G. C. Dunbar; and Tracey deposing (p. 27) that Ray avowed himself as the authorized agent of G. C. Dunbar and his assignee; and Green also deposing (p. 276) the fact that Dunbar was a party to the arrangement that Smyth should settle the claims of the New York creditors against Dwyer; and Ray himself deposing as to the letter of May 22, 1856, written by him to Dwyer (p. 34–5)—the Court erred in excluding Russell's deposition (p. 29.) Conceding that whether there was sufficient proof of the agency to warrant the admission of the deposition was a preliminary question for the Court to determine, it is insisted that here the proof was sufficient. Stark. on Ev., part 4, tit. *Agent*; *U. S.* v. *Gooding*, 12

Wheat., 469–70; *Am. Fur Co.* v. *U. S.*, 2 Peters, 464; *Brockelbank* v. *Sugrue*, 5 C. & P. 21, 4 Eng. C. L. The deposition should have been read so soon as there was evidence of authority or acquiescence sufficient to be weighed by the jury. *Philadelphia, Wilmington, & Baltimore Railroad Company* v. *Howard*, 13 How., 333; *Barreda, &c.* v. *Silsbee, &c.*, 21 How., 165; *Law* v. *Cross*, 1 Black, 538–9; *Cliquot's Champagne*, 3 Wallace, 140.

2. The Court erred in excluding Smyth's letter from the jury. His agency being proved by evidence *aliunde*, the letter does not fall within the rule which excludes *res inter alios acta*, but is to be regarded as *Smyth's* act and the Defendant's voucher. *Hunter* v. *Campbell*, 1 Spears, 55; *Wilkinson* v. *Candlish*, 5 W. H. & G. (Exchcq.) 91; or as so illustrating and characterizing the principal fact as to constitute the whole one transaction. It was necessary to exhibit the principal fact in its true light and give it its proper effect. *Allen* v. *Duncan*, 11 Pick., 308; *Law* v. *Cross*, 1 Black, 539; *Beaver* v. *Taylor*, 1 Wallace, 642.

3. The Court erred in not giving the instructions asked by Defendant, and also erred in instructing the jury, on Plaintiff's motion, that to bind Dunbar by the compromise, Defendant must prove an acceptance by Dunbar of the settlement. There is a wide distinction between general and particular agents. *Fenn* v. *Harrison*, 3 T. R., 460, 4 Ib., 177. In the former case the principal may be bound by his agent's acts, though exceeding his authority *Runquist* v. *Ditchell*, 3 Esp., 64; *Whitehead* v. *Tuckett*, 15 East., 408; *Tidd, &c.* v. *Robinson*, Ry. & Moo., 217, 21 Eng. C. L.; *Gillman, &c.* v. *Robinson*, 1 C. & P., 642, 11 Eng. C. L.; *Andrews* v. *Kneeland*, 6 Cow., 357; *Jeffrey* v. *Bigelow*, 13 Wend., 520.

4. The Court erred in instructing the jury, on the Plaintiff's motion, to find for him if they should find from the evidence that the Defendant executed and delivered the notes and had not paid the same. *Butler* v. *Rhodes*, 1 Esp., 236: *Bradley*

v. *Gregory*, 2 Camp., 383; *Boothby, &c.* v. *Sowden*, 3 Ib., 175 *Cork* v. *Saunders*, 1 Barn. & Ald., 45; *Wood* v. *Roberts*, 2 Stark., 417, 3 Eng. C. L.; *Tatlock, &c.* v. *Smith, &c.*, 6 Bingh., 339, 19 Eng. C. L.; *Good* v. *Cheeseman*, 4 C. & P., 513, 2 Barn. & Adol., 328, 19 Eng. C. L., 22 Ib.; *Seager, &c.* v. *Billington*, 5 C. & P., 456, 24 Eng. C. L.; *Fellows* v. *Stevens*, 24 Wend., 300. The law, with respect to defences founded on compositions between a debtor and his creditors, appears not to have been distinctly defined until the case of *Good* v. *Cheeseman*, above cited. It used to be sometimes laid down that a right of action once vested could only be barred by a release or by accord and satisfaction. But since the decision of that case the law has been regarded as settled that a composition agreement by several creditors, although by parol, so as to be incapable of operating as a release, and although unexecuted so as not to amount in strictness to a satisfaction, will be a good answer to an action by a creditor for his original debt, if he accepted the new agreement in satisfaction thereof; and that for such an agreement there is a good consideration for for each creditor, viz: the undertaking of the other compromising creditors to give up a part of their claim. *Williams*, J., in *Boyd* v. *Hind*, 1 H. & N. (Excheq.) 947.

5. Whether on the points submitted to the judge at the trial his ruling was at the time right or not, yet upon the whole record before this Court (*Garland* v. *Davis*, 4 How., 143) it appearing that there has been a miscarriage in the way that the case went to the jury, (*Mackley* v. *Pattenden*, 1 El. Bost. & Smith, 183, 101 Eng. C. L.,) the judgment should be reversed, the verdict set aside, and a new trial directed.

~~CONWAY ROBINSON~~,
with
~~WM. G. HALE~~,
} *For Pltf. in Error.*

Supreme Court of the United States.

THOMAS A. DWYER,

PLAINTIFF IN ERROR,

vs.

WILLIAM H. DUNBAR,

DEFENDANT IN ERROR.

ERROR TO DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

LORENZO SHERWOOD,

Of Counsel for Defendant in Error.

W. H. Moore, Printer, No. 484 Eleventh Street.

SUPREME COURT OF THE U. S.

DECEMBER TERM, 1856.

THOMAS A. DWINEL, Plaintiff in Error, } No. 50.

SUPREME COURT OF THE U. S.

DECEMBER TERM, 1866.

THOMAS A. DWYER, *Plaintiff in Error.*
vs.
WILLIAM H. DUNBAR, *Defendant in Error.* } No. 56.

The plaintiff below, Dunbar, brought his action in the District Court of the United States for the Eastern District of Texas, on two promissory notes made by Dwyer and recovered a verdict on the 10th day of January, 1860, for $3,900 17, on which judgment was rendered with costs.

The suit was brought by plaintiff below in a fiduciary capacity, acting as assignee for the benefit of the creditors of George Dunbar.

The defence interposed, was, that the plaintiff below had agreed to a compromise of this debt, by the result of which his *pro rata* with other creditors of Dwyer would have amounted to $84, or thereabouts, as his share of the assets of Dwyer. [Ans. of Ray to 8th int., p. 32.]

It appears from the Record that one H. M. Smythe was employed by the bulk of Dwyer's creditors to arrange their debts, and it is attempted to be shown, by implication, and through heresay, rather than proof, that Dunbar joined in this arrangement.

The meeting of the creditors who gave Smythe authority to settle their claims was at the office of C. B. Tweedy & Co. Smythe deposes —"That amongst those who came to the office of C. B. Tweedy &

"Co., there was a person who represented himself as appearing for "William H. Dunbar, assignee of George C. Dunbar, one of the cred- "itors of said Dwyer. This person, whose name I do not remember, "and do not know that I ever knew, stated that Dunbar, assignee as "aforesaid, was willing to do what other creditors were, respecting the "claim of George C. Dunbar; that he, Dunbar, assignee, did not wish "to sign any papers for fear of implicating himself with the creditors "of George C. Dunbar." [Rec., p. 20.]

Smythe further deposes: "That, although he did not hold the "power of attorney of said Dunbar, assignee, he presumed he would "be doing right in adjusting the same, predicating his acts upon the "representations of the person above spoken of, who appeared as "the agent of Dunbar. That he gave to said Dwyer a conditional "receipt respecting the claim of Dunbar." [Record, p. 20.]

The conditional receipt is conclusive evidence that Smythe himself did not consider that he had authority from Dunbar.

The deposition of J. S. Ray, who turned out to be the person spoken of by Smythe and others, is very full, and denies any authority to Smytbe through him, and also denies any authority given by Dunbar to him to make any agreement. [Record, pp. 31–32.]

The letter of Ray to Dwyer, and which appears to be merely a friendly letter, and which Ray, in answer to the 7th interrogatory, page 32, says he had no authority for writing, is relied on by defendant below as evidence. The expression, "Since then I have seen Mr. Dunbar. He is *disposed* to arrange your indebtedness the same as the other creditors," amounts to nothing, without showing that he was *sufficiently disposed* to enter into something in the nature of an agreement, which Dunbar declined throughout. [Record, p. 34.]

The *pro rata* assigned to Dunbar, $84, and which Dunbar declined, was afterwards taken or withdrawn by Dwyer. [See Green's deposition, p. 27.]

The jury have found upon the facts of the case as to whether there was an agreement to discharge the debt on a compound. Their finding is conclusive under this uniform refusal of Dunbar.

In the instructions given the jury by the Court, when analyzed, in connection with the facts proved, there is nothing exceptional. It being clearly proved that no specific authority was given, it was proper for the Court to charge the jury, that in order to bind Dunbar, by an after-agreement, defendant must prove an acceptance of the settlement by Dunbar. The instructions refused were hypothetically predicated on a state of facts entirely disproved. The full law of the case was embodied in the instructions given.

It is insisted that this is a clear case for affirmance.

LORENZO SHERWOOD,

Of Counsel for Defendant in Error.